U.S. Department of Labor

Office of Administrative Law Judges
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DATE ISSUED: October 12, 2000

CASE NO. 1999-STA-5

In the Matter of:

DANNY JOHNSON,
Complainant

v.

ROADWAY EXPRESS, INC.,
Respondent

APPEARANCES:

Paul O. Taylor, Esq.
For the Complainant

Sally J. Scott, Esq.
For the Respondent

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER ON REMAND

I. PROCEDURAL HISTORY

On July 21, 1999, I issued a Recommended Decision and Order in this case which had been brought under the "whistleblower" employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 ("STAA" or "the Act"), 49 U.S. C. § 31105 (formerly 49 U.S.C. app. § 2305), and the applicable regulations at 29 C.F.R. Part 1978. The Act protects employees who report violations of commercial motor vehicle safety rules or who refuse to operate vehicles in violation of those rules.

On March 29, 2000, the Administrative Review Board, ("ARB" or "the Board"), remanded the matter for further consideration. The Board affirmed my findings of liability, that Roadway violated the STAA, and affirmed my order of reinstatement. The Board remanded the

matter for consideration of the award of back pay, stating that Roadway did not sustain its burden of proving that Johnson did not use due diligence in pursuing suitable employment or that the Burlington truck driver position he declined to accept was substantially equivalent to his truck driver position with Roadway. The Board directed me to determine when and if Johnson's back pay entitlement was tolled and the benefits, medical expenses, vacation pay and holiday pay to which Johnson is entitled.

II. LAW OF THE CASE OR MANDATE RULE[1]

As a preliminary matter, the mandate of the Administrative Review Board (the "Board") must be ascertained. In its "Conclusion", the Board stated it affirmed the award of back pay and benefits and was remanding the matter "to the ALJ to recalculate the back pay award and Johnson's entitlement to other benefits discussed in Part III D of this decision." (Decision and Order of Remand ("D&OR")). In section III B, regarding back pay, the Board found that Roadway failed to prove either that comparable jobs were available or that Johnson failed to exercise due diligence in finding substantially equivalent and otherwise suitable employment. It also found Roadway did not prove Johnson failed to exercise due diligence in mitigating his damages when he declined a position with Burlington Truck Lines. (D&OR at 15). The Board further found although the burden had not shifted to him because of the employer's failure of proof, Johnson had, in any case, demonstrated he had exercised reasonable diligence. (D&OR at 16 n. 14).

The Board then stated, "[I]n light of our conclusion that Johnson's refusal to take the Burlington Truck Lines job did not terminate his entitlement to back pay, it is necessary to remand this case to the ALJ to determine if or when Johnson's back pay entitlement was tolled." (D&OR at 17)(emphasis added). It observed reinstatement would toll the running of the back pay entitlement. Finally, the Board wrote, "[T]he ALJ should also determine whether the discharge by Landstar Poole affects back pay entitlement."[2] (D&OR at 17).

The complainant's counsel argued, in a Motion in Limine, that the Board's remand does not allow Roadway a second bite at the apple, i.e., to introduce new evidence that "substantially equivalent" jobs were available and therefore the testimony of witnesses from Yellow Freight Systems, Inc., and USF Holland should not be permitted. He argued the remand permits only a

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[1] The "mandate rule," i. e., the duty of lower court to follow what has been decided by the higher court at an earlier stage of the litigation, is a specific application of the doctrine commonly known as the law of the case. *Fed. Rules App. Proc. Rule* 41(a), *City of Cleveland, Ohio v. Federal Power Commission*, 561 F.2d 344 (DC 1977). The "law of the case" doctrine applies within administrative agencies. When the Board has ruled on a question of law, the doctrine binds an administrative law judge acting after a remand of the case. *Stephenson v. NASA*, ARB Case No. 98-025 (July 18, 2000); *see e.g., Ruud v. Westinghouse Hanford Co.*, No 1988-ERA-33, ALJ RD&O on Remand, Dec. 8, 1988, at 5.

[2] While the ideal time and vehicle for clarifying the Board's mandate may have been on a Petition for Reconsideration or by a motion for recall of its mandate, at least one scholar has observed that the matter may be resolved upon "appeal from the judgment rendered after completion of the proceedings from which the case was remanded." James Wm Moore, MOORE'S FEDERAL PRACTICE, Vol. 1B, Section 0.404[10] (1988).

mathematical calculation of back pay and a determination "when tolling of back pay occurred" based upon the existing record.

In response, the employer argued that its offered testimony "falls squarely within the Administrative Review Board's remand order. . ." Roadway referred to the Board's "if and when" tolling language and correctly stated that a resolution of the tolling issue includes a determination whether it establishes that comparable jobs were available. It logically deduces that neither the administrative law judge nor the Board considered the matter subsequent to the complainant's refusal to accept the Burlington offer and thus Roadway is not getting "two bites at the apple."

In my humble opinion, the Board's D&OR allows room for both interpretations. The matter must be resolved by examining the "law of the case" doctrine and the Board's language.

"The law of the case" or "mandate" doctrine is that:

> [a] decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation . . . it serves the dual purpose of: (1) protecting against the agitation of settled issues; and (2) assuring the obedience of inferior courts to the decisions of superior courts . . . after the law of the case is determined by a superior court, the inferior court lacks authority to depart from it, and any change must be made by the superior court that established it, or by a court to which it, in turn, owes obedience . . . When a case is appealed and remanded, the decision of the appellate court establishes the law of the case and it must be followed by the trial court on remand . . .

James Wm Moore, MOORE'S FEDERAL PRACTICE, Vol. 1B, Section 0.404[4.-1-2] (1988). Moore also notes that "[O]nly such issues have actually been decided, either explicitly, or by necessary inference from the disposition, constitute the law of the case."[3] *Id*. at 120, n. 15 and at 174.

"This "mandate rule" is sometimes described as part of the inaptly-named "law of the case" doctrine." *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, Case No. 98-4395 (6th Cir. Dec. 29, 1999)(Administrative agencies are not free to ignore the mandate of a federal circuit court). An appellate court's mandate forecloses a lower court or an agency only from revisiting issues that the appellate court actually decided. *See, Nguyen v. U.S.*, 792 F.2d 1500, 1502 (9th Cir. 1986)("[A]lthough the mandate of an appellate court forecloses the lower court from reconsidering matters determined in the appellate court, it leaves to the [lower] court any issue not expressly or impliedly disposed of on appeal.")

[3] In light of my opinion below that the Board's comments concerning Johnson's efforts to rejoin the workforce are dicta, one must ask whether such dicta can fall within this "necessary inference" rule.

The second prong of the mandate doctrine, i.e., assuring the obedience of inferior courts to the decisions of superior courts, is readily resolvable, as I only wish to carry out the Board's directions. The second, i.e., protecting against the agitation of settled issues, is more problematical because it depends on an interpretation of what the Board ordered.

In analyzing whether or not Johnson's rejection of the Burlington job offer, in May 1995, tolled his entitlement to back pay, both the Board and I necessarily had to consider whether Roadway had proven the complainant's mitigation efforts through the end of May 1995 were unsatisfactory. I went no further in my initial Recommended Decision and Order ("RD&O"). The Board looked beyond the Burlington evidence and invited me to determine whether or not Johnson's discharge from Landstar Poole, on March 7, 1998, because he violated company policy affected his back pay entitlement. However, the Board did not explicitly address the many intervening job offers Johnson declined, his lay offs or the employments from which he resigned between May 31, 1995 and the date of the hearing, in May 1999.[4] Thus, considering "if or when" Johnson's entitlement to back pay tolled, would not "agitate settled issues" but would resolve matters not considered by either judicial body, as well as follow the Board's explicit direction. Moreover, the Board explicitly invited the taking of new evidence. It wrote that it was unaware whether Roadway had reinstated Johnson as I had directed and observed that such reinstatement would toll his entitlement to back pay. Moreover, the record contains no post-hearing evidence. Thus, new evidence is necessarily required to fill this void between May of 1995 when Johnson declined the job offer from Burlington and the date of the complainant's reinstatement, August 2, 1999. (TR 19).[5]

Finally, Roadway itself agreed, at the hearing, that it only sought to introduce post-Burlington (or post May 31, 1995) evidence.

In conclusion, I determine that it is appropriate, under the Board's ruling, for me to receive and consider both evidence of record and new evidence concerning when and if the complainant's entitlement to back pay ceased.

III. HEARING TESTIMONY

[4] In footnote 14, D&OR, the Board referred to evidence of record establishing Johnson satisfied the reasonable diligence test, such as frequently contacting his union business agent, applying with unionized Yellow Freight Systems, checking want ads, calling all over the country, taking jobs outside the trucking industry, and looking for non-union trucking jobs. The Board observed these efforts demonstrated his "'continuing commitment to be a member of the work force.'" However, since the Board held that Roadway had not met its burden and since the issue of "when and if" the entitlement was tolled was not resolved, these comments concerning Johnson's efforts are likely mere dicta.

[5] The following abbreviations are used for reference within this opinion: JX- Joint Exhibits; CX- Claimant's Exhibit; DX-Director's Exhibit; EX- Employer's Exhibit; TR- Hearing Transcript; Dep.- Deposition.

1. Danny Johnson

Johnson started working at Chieftain Truck Lines on March 11, 1999 and he voluntarily left Chieftain on May 28, 1999 to work for Saturn. (TR 30-31; CX A). Johnson worked for Saturn from May 28, 1999 through July 25, 1999. (TR 32). Johnson testified that he left Chieftain to work at Saturn because Saturn paid more money. (TR 36). At Saturn, Johnson earned $1200 per week for four days of work. (TR 36). Johnson was employed by Pro Truckers, (Professional Drivers), not Saturn, but was assigned to Saturn. (TR 37-38).[6] A majority of the runs for Saturn were from Florida back to Spring Hill, Tennessee. (TR 36). Johnson was domiciled in Spring Hill, Tennessee. (TR 37). Johnson would leave on Sunday and come home on Thursday. (TR 41). At Saturn, Johnson had to hook up his equipment and perform pre-trip inspections. (TR 46). When Johnson performed bid runs for Roadway from Chicago Heights, he did not hook up his equipment, Roadway hired employees to hook up the equipment. (TR 46-47). On a District bid for Roadway, Johnson would have to hook his trailer. (TR 49). Johnson testified that he could have driven for Pro Truckers on runs that would have allowed him to be home every night. (TR 38). Johnson did not choose the routes that allowed him to be home every night because he made more money if he was on the road longer. (TR 39). Through Professional Drivers, Johnson had medical insurance, but no pension plan and no dental insurance. (TR 40). Johnson testified that Professional Drivers paid more in mileage and had better benefits. (TR 42). Chieftain did not offer any medical insurance. (TR 43). Johnson testified that Chieftain had one week vacation and Professional Drivers offered two weeks vacation. (TR 44). Johnson left employment with Saturn to return to Roadway. He started at Roadway on August 2, 1999. (TR 32). After he was reinstated at Roadway, Johnson received $11,930 in back pay. (TR 45).

Mr. Johnson testified as a rebuttal witness. (TR 293). Mr. Johnson testified that Jim Harding was a road driver and Union Steward for Roadway in 1995. (TR 294). Mr. Johnson's Business Agent with Local 710 in 1995 was Bob Falco. Mr. Johnson spoke with Mr. Falco when he was terminated in 1995. (TR 294). When Mr. Johnson was on a district bid for Roadway, he was home every day and had Saturday off work. (TR 298-299). In a six month period on a satellite bid, Mr. Johnson had to stay in a motel approximately three nights. Mr. Johnson was on the district satellite bid for one year. (TR 299). On the satellite bid, Mr. Johnson was not required to hand unload freight. Mr. Johnson lived at St. John, Indiana, which is twenty miles from Chicago Heights, when he was on the satellite bid. (TR 301). At the time of the hearing, Mr. Johnson was on a sleeper team bid and was able to choose his co-driver. (TR 302). Prior to his termination in March of 1995, Mr. Johnson testified that he was able to hold every bid he selected. (TR 306).

Under the Central States Pension Fund, covering drivers in Nashville, drivers are not able to retire with 25 years of service. (TR 306). When he first was hired by Roadway, Mr. Johnson worked out of Nashville and was a member of Local 480 for five years. (TR 307). Mr. Johnson

[6] According to the W-2, the official name of the employer is Professional Drivers. (TR 39).

testified that service at Local 710 a driver could retire after 25 years of service at any age and receive his full pension. However, the Central States Pension Fund did not offer the same benefit. (TR 309). Mr. Johnson testified that Jim Harding was a Union Steward, and was not a Business Agent in 1995. (TR 310).

When Mr. Johnson was on the satellite bid, he was eligible for a call on Sunday starting at 10:00 a.m. (TR 310). Mr. Johnson worked on Sunday satellite bid in November of 1994 until he was terminate in March of 1995. (TR 313). Prior to November of 1994, he worked on a district bid. (TR 313). When Mr. Johnson worked the Lincoln to Omaha bid he was home every other night. (TR 317). Mr. Johnson testified that he would be called for another run eight hours after he came into the terminal. (TR 318). Mr. Johnson testified that he was able to get his preference in bids, the Lincoln to Omaha run. (TR 319). On Sunday satellite bids, Mr. Johnson would occasionally have to drop and hook. (TR 321). At the time of the hearing, Mr. Johnson was working on the sleeper team and would be on a run from two to five days away from home. (TR 323). On the sleeper team, Mr. Johnson gets three and a half and then two and a half days off before he goes back out again. (TR 324).

2. Michael Iwanaga

Mr. Iwanaga is employed by Consolidated Freightways, ("Consolidated"), and has worked for Consolidated for twenty years. (TR 54). Mr. Iwanaga worked as a Dispatch Operations Manager for eight years. He manages and oversees all of the over-the-road drivers that work inside the Chicago land area. (TR 54). Mr. Iwanaga is responsible for personnel issues with the drivers and is responsible for hiring. (TR 55). Consolidated is a less than truckload carrier, ("LTL"), operating throughout 48 states, Mexico and Canada. (TR 55). Consolidated has various terminals in the Midwest area, including its Chicago terminal, which is fifteen miles from Roadway's Chicago terminal. (TR 55-56). Consolidated offers its drivers bid runs, based on seniority, and extra board positions. (TR 56-57). The bid runs last for six months. The collective bargaining agreement designates 60 percent to bid runs. (TR 57). On bid runs, employees are home every night. (TR 57). The remaining 40 percent are overnight runs. The extra board runs are for drivers who do not have a bid. The extra board runs are on a continuous rotation, first in first out basis. (TR 58). About 40 percent of the bid runs have "meet and turn operations," where they meet another driver half way and exchange equipment. (TR 64-65). Consolidated drivers rarely handle freight and the drivers are represented by a union. (TR 65-66). Consolidated is a party to the National Master Freight Agreement and the drivers are member of the Local 710 Dispatchers. (TR 66). Consolidated and Roadway are governed by the same contract. (TR 67).

Mr. Iwanaga testified that from 1995 through 1999, Consolidated was hiring over the road drivers at the Chicago facility. Mr. Iwanaga testified that Consolidated has been continuously hiring since January of 1993, when he started at his current position. (TR 67). Mr. Iwanaga testified that Consolidated has more openings than qualified candidates. (TR 67). From 1995 to 1999, jobs were advertised in the newspaper, by radio, banners on trailers, flyers, posters, job

fairs, and posted ads at truck stops. (TR 68). Applicants could apply by phone, with an 800 number, or in person at a Consolidated facility. (TR 69). Consolidated requires new employees to have a Class A CDL with doubles, a hazardous materials endorsements, and one-year driving experience or have graduated from a certified driving school. Mr. Iwanaga testified that from 1995 until 1997, Consolidated required five years of doubles experience. Mr. Iwanaga testified that he has hired a former Roadway employee who had been terminated for excessive absenteeism. (TR 70).

Consolidated hired approximately six drivers in 1995. (TR 80). Consolidated has five terminals in the Chicago area. (TR 81-82). Mr. Iwanaga testified that a majority of those hired in 1995 went to the CGI terminal. (TR 83). Mr. Iwanaga testified that depending on "luck of the draw," extra board drivers may start and finish work out of the facility in the same day or may have to spend the night on the road. (TR 84). An extra board driver does not know exactly when and where he will work. (TR 85). Mr. Iwanaga agreed that typically a new hire at Consolidated works on the extra board. (TR 86). An extra board driver at the bottom of the seniority list can be called to fill in on a sleeper team, which travel all over the country. (TR 86). Mr. Iwanaga testified that it normally takes a year to two years before a driver can achieve a bid run. (TR 87-88). The bid is dependent on seniority. (TR 89). Consolidated does not have any bid runs that allow drivers to be off on Saturday and Sunday. (TR 90). Under the collective bargaining agreement, new drivers have a 30-day probationary period. (TR 91). In 1995, a new hire made 75 percent of the April 6, 1994 rate. (TR 95). A driver at Consolidated for the first two years would not earn as much as a driver who had worked with Consolidated for more than two years. (TR 96). Under the collective bargaining agreement, an extra board driver could be on the road for more than two nights without coming home. (TR 98). However, Consolidated's policy, in the last year or two, is not to have a driver out more than one night away from home. (TR 98, 101).

3. Richard Hopkins

Mr. Hopkins has worked for U.S.F. Holland, ("USF") for fourteen years and has been the Director of Terminal Operations for two years. (TR 103). Mr. Hopkins is responsible for the day to day operations of the Northwest region. Prior to being Director of Terminal Operations, Mr. Hopkins was the Terminal Manager in Chicago and was responsible for hiring. (TR 104). USF is a regional carrier in the Midwest and Central Southern Region. (TR 104). USF has three terminals in the Chicago area, one in Danville, one in Lincoln and one in Salem. (TR 105). USF's highway drivers move freight from terminal to terminal. Approximately sixty percent of highway drivers are bid positions. (TR 106). Sixty percent of the bid runs stay one night and return the next day, the remaining bids would return the same day. (TR 107). Under USF's open board, a driver dispatched on Sunday night would return by Friday night. (TR 107).

USF city drivers were responsible for local pick up and delivery operations. City drivers did not work weekends and were home every night. USF's highway drivers handle freight in twenty percent of their tours. (TR 110-111). City drivers handle freight daily. City drivers are

paid on an hourly rate and highway drivers work a combination of an hourly rate and mileage rate. An average highway driver earns approximately ten percent more than a city driver. (TR 111-112). City and highway drivers may transfer to different positions. The drivers are represented by a union. (TR 112). USF agreed to all of the provisions of the National Motor Freight Agreement. USF was part of the National Motor Freight Agreement from 1994 until 1998. (TR 113).

Mr. Hopkins testified that USF was hiring highway and city drivers from 1995 through 1999 at all of USF's locations. USF advertised with newspaper ads, postings at truck stops, and would hire though the local union. (TR 113). USF required its drivers to be twenty-one years old, with a CDL and Haz Mat endorsement, and 100,000 miles of driving experience. (TR 114). Hiring was approved by the Terminal Managers. (TR 114). Mr. Hopkins was a Terminal Manager in Chicago from 1996 to 1998. (TR 114-115). As a terminal manager, Mr. Hopkins would consider employees who had been terminated for excessive absenteeism. (TR 115). The Chicago and Wheeling terminal had only city drivers. (TR 117). Where USF had a highway and city domicile, the drivers could transfer into either position. USF maintained seniority lists of city or highway drivers hired between May of 1995 and August of 1999 at its various locations. (TR 117-121).

Mr. Hopkins testified that a newly hired road driver would be entered as an over-the-board driver and would not be able to obtain a bid for approximately two years. (TR 122). Mr. Hopkins agreed that the job duties of a city driver are markedly different from the duties of a road driver. (TR 123). The bids are selected in order of seniority. (TR 126). USF's equipment is interchangeable between the highway and the city. Mr. Hopkins last worked with Roadway Express in 1986. (TR 127). USF has no road drivers based in Chicago. Until the fall of 1999, the closest terminal to the Chicago Heights area with road drivers was based in Milwaukee or Rockford. Rockford is 100 miles from Chicago Heights, Illinois. (TR 130). Mr. Hopkins testified that he would hire a driver living in the Chicago Heights area as long as he could get to Danville within a couple of hours. (TR 131). When USF hires a new road driver, the driver goes to the bottom of the seniority list, regardless of the driver's experience with other companies. (TR 132). A new driver would be paid 75 percent of the April 4, 1995 wage. (TR 133). The pay for a new driver would be lower for the first two years.

If a driver wants to switch locations, he has to quit and become a new hire and lose seniority. (TR 136-137). An open board driver does not know where he is going on a predictable basis and does not know when he will be home. (TR 137). USF has terminals which give work calls three to four hours in advance of the driver's time to report. (TR 141). USF's dispatch is consistent, nightly between 8:00 and 11:00 p.m. (TR141).

4. Thomas Forrest

Mr. Forrest is employed by Roadway and has worked as a Labor Relations Manager for

the Midwest division for one year. (TR 148-149). Mr. Forrest is a liaison between the company and unions in Indiana, Iowa and Illinois and negotiates contracts and prepares grievances. (TR 149). The duties of Roadway's drivers are very similar with the duties of USF's highway drivers and Consolidated's road drivers. Roadway requires drivers to hook their own sets at a non-domicile post or a closed terminal. Bid drivers also would have to hook their own freight.[7] (TR 150). Over the road drivers, on a rare occasion, are required to handle the freight. (TR 151). On bid runs, a driver could be away from home from one day to four days, depending on the bid. (TR 152). On a bid run, a driver could be on the road for three nights. (TR 155). A district bid driver could be sent out to other dispatches once they reached their initial destination. (TR 156). On a district bid run, the driver would be on the road for no more than one night. (TR 157).

Roadway's vacation pay was based on seniority. (TR 157). The maximum vacation is five weeks with twenty years of seniority. (TR 158). Employees are required to take the first three weeks of vacation and Roadway will pay if an employee does not take the fourth and fifth weeks of vacation. (TR 158). Employees must work sixty percent of the year, with 187 tours of duty, to earn vacation time. The vacation time must be used in the next year, or it is forfeited. (TR 159). Mr. Forrest agreed that had Mr. Johnson received back pay for the entire time he was not working at Roadway, Mr. Johnson would have been credited with having earned the vacation time. (TR 164). Employees are given ten paid holidays per year as part of their regular weekly compensation. If the driver works the holiday, they get an extra four hours of straight time pay. (TR 166-167). Normally, Roadway does not work on holidays. Thirty to forty drivers, out of 450, receive holiday pay. (TR 167).

Mr. Forrest testified that Jim Harding was a business agent for Local 710, and formally was a union steward. Mr. Harding represented road boards for Local 710, Roadway Express, Yellow Freight, ABF and possibly Holland and he may have represented Consolidated Freightways. (TR 183-184). Local 710 had other business agents other than Mr. Harding. (TR 188). Mr. Forrest would contact Mr. Harding to find job applicants. (TR 185). Mr. Harding passed away in November of 1999. Mr. Harding told Mr. Forrest that Mr. Johnson had not contacted him anytime after his discharge looking for work in the area. (TR 186).

Mr. Forrest testified that Mr. Johnson returned to work on August 2, 1999, but was not compensated for that day. (TR 187). Mr. Forrest testified that it is Roadway's policy not to compensate drivers for physical and drug testing. Roadway compensates employees for training. (TR 188). Mr. Forrest testified that if Mr. Johnson was operating a satellite bid in 1995, it was possible that he could have been home every night. (TR 191). Roadway's bid drivers do not handle freight twenty percent of the time. (TR 192). Mr. Forrest does not recall if Mr. Johnson was 65 on the seniority list. Mr. Forrest testified that in 1995 at the Chicago Heights area, there were around 400 road drivers. (TR 193). A satellite bid driver[8] would stay in a motel a couple of

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[7] "Hooking their own freight" is to hook the tractor and trailers together. (TR 151).

[8] A satellite bid driver and a district bid run driver are the same position. (TR 198).

times a month and would rarely stay two nights in a row. (TR 197).

Mr. Forrest agreed that Roadway's extra board and bid runs are similar to Consolidated Freightways' and USF Holland's. (TR 198-199). Mr. Forrest testified that Roadway drivers are not frequently away from home for four or five nights in a row. (TR 199-200).

5. Hugh T Roberts, Jr.

Mr. Roberts has worked for Yellow Freight Systems for twenty-two years. (TR 207). Mr. Roberts has been the Manager of Labor Relations for the states of Illinois and Wisconsin for six years. As a manager, Mr. Roberts negotiates labor contracts, sits on grievance panels, and provides labor assistance. In Chicago, Yellow Freight employees participate in the 710 Collective Bargaining Agreement, the same agreement in which Roadway participates. (TR 208-209). Yellow Freight is a party to the Master Freight Agreement. (TR 209). Mr. Roberts was Terminal Manager in Milwaukee from 1981 through 1994 and was responsible for hiring. (TR 209). Yellow Freight has over-the-road drivers in Chicago Ridge, Illinois and Nashville. (TR 210). Yellow Freight's Chicago Ridge terminal is about 12 to 15 miles from Roadway's Chicago Heights terminal. (TR 210). Yellow Freight's Chicago Ridge terminal operates with over the road drivers, some assigned to bid runs and some assigned to extra board, and they have sleeper teams. Sixty percent of the runs are bid runs. (TR 211). Some of the bid runs allow the employees to be home every day. The average time a driver would be out on a run is two days. The contract allows a driver to request to come home on his second dispatch. (TR 212). Mr. Roberts testified that some new hires would get a chance to get on a bid run by the over the road team operation. (TR 213).

The extra board list ranks and dispatches employees by seniority. Extra board drivers do not have a defined destination. A driver has two hours to report for a dispatch on the extra board. (TR 214). An extra board driver may request to come home after the second dispatch. Drivers on extra board and bid runs do not handle freight and occasionally assemble equipment. (TR 216). Mr. Roberts testified that since mid-to-late 1994, Yellow Freight has had more job openings than qualified applicants. (TR 217). Yellow Freight was hiring over the road drivers at the Chicago Ridge terminal in 1995. (TR 217-218). Yellow Freight advertised job openings in the media, radio, ads in the Chicago and suburban newspaper, recruitment booths at truck tops, fliers, Teamster halls, job fairs, a banner and a billboard on I-55 going into Chicago. (TR 218, 278). Jim Harding was a business agent from Local 710 between 1995 and 1999. (TR 218). Mr. Roberts does not recall ever discussing Mr. Johnson with Mr. Harding. (TR 219). The Line Haul Manager has the authority to make hiring decisions for over the road drivers.

Yellow Freight maintains records of individuals who apply for employment as drivers. (TR 220). Yellow Freight does not have any record of Mr. Johnson having applied for employment from 1995 through 1999. (TR 222). Mr. Roberts did not personally review the records to determine whether Mr. Johnson applied for employment. (TR 224). An employee at the General Office's Human Resource Department, Pam Klockstein, checked the records and

found no history of an application by Mr. Johnson. (TR 225). Applicant's information is kept on a computer program in the ordinary course of business. (TR 227). Ms. Klockstein, as part of her normal duties, has access to the application information. (TR 227). Mr. Roberts does not have access to the application records. (TR 230). Mr. Roberts does not have hiring responsibility as a Labor Relations Manager. (TR 232). However, Mr. Roberts calls the Human Resource Department to obtain information on other employment matters. (TR 232-233). Mr. Roberts called to have the employment records checked within a month of the hearing. (TR 239). Mr. Roberts has never found information from the Human Resource Department inaccurate. (TR 240).

Mr. Roberts testified that the pension fund in Nashville has reciprocity. (TR 244). For example an employee participating in Local 710 pension fund and Southern Region Pension Fund have reciprocity. (TR 244-245). Teamster Union Fund 705 is not reciprocal. A newly hired driver at Yellow Freight has a probationary period of 30 days and is place on the extra board for dispatch purposes. (TR 245). New hires receive 75 percent of the current pay rate for one year. Mr. Roberts testified that a employee with low seniority and making 75 percent of the pay rate, who is on a sleeper bid, can earn more than a senior employee on 100 percent compensation. (TR 246).

Mr. Roberts does not know if employees in the Central and Southern states can retire after 25 years and receive a full pension. (TR 249, 275). Under the old contract in affect in 1995 and 1996, a new hire was paid 75 percent of the April 1994 rate. (TR 249-250). If an employee requests, the employee can come home after two tours. (TR 251). An extra board driver could be dispatched to go anywhere in the U.S. on a sleeper team and does not have a choice if he does not want to run sleeper team. (TR 253). Mr. Roberts testified that Yellow Freight advertised in Tribune and Northwest Herald. (TR 255). Mr. Roberts does not know if Yellow Freight advertised in the Chicago Tribune in 1995. (TR 255). During June, July, and August of 1995, Mr. Roberts testified that there were ads at truck stops adverting openings for line haul drivers. Mr. Roberts agreed that it takes a new driver approximately two years or longer to hold a bid run. (TR 266). Yellow Freight has bids where a driver is back home every day. (TR 267). Yellow Freight does not offer routes, or satellite bids, that allow a driver to be home every night. (TR 270). Mr. Roberts estimated that ten percent of Yellow Freight drivers are back home on the same day. (TR 270-271). Bid drivers have more of a set schedule of their runs, where extra board drivers do not know when they will be called. If an extra board driver is called, he is required to report to work within two hours. (TR 274).

IV. STIPULATIONS

The parties agree to, and I accept, the following stipulation of fact:

1. The 1995 average gross wages of the Roadway Express, Inc. driver immediately above

and the driver immediately below complainant on the March 23, 1995 Chicago area road drivers seniority list was $5,155 monthly and $1,190 weekly.

2. The 1996 average gross wages of the Roadway Express, Inc. driver immediately above and the driver immediately below complainant on the March 23, 1995 Chicago area road drivers seniority list was $5,430 monthly and $1,253 weekly.

3. The 1997 average gross wages of the Roadway Express, Inc. driver immediately above and the driver immediately below complainant on the March 23, 1995 Chicago area road drivers seniority list was $5,261 monthly and $1,214 weekly.

4. The 1998 average gross wages of the Roadway Express, Inc. driver immediately above and the driver immediately below complainant on the March 23, 1995 Chicago area road drivers seniority list was $5,382 monthly and $1,242 weekly.

5. The 1999 average gross wages of the Roadway Express, Inc. driver immediately above and the driver immediately below complainant on the March 23, 1995 Chicago area road drivers seniority list was $5,681 monthly and $1,311 weekly.

6. Johnson earned interim wages at Arrowhead Construction, Celadon Trucking, EVI Services, DOT Leasing, Aaron's Limousine, Laura Stewart, Landstar Poole, TransState Lines, CRST, DeKalb Transportation, Chieftain, and Saturn totaling $46,982.

7. Had Johnson's employment with Roadway Express, Inc. continued after March 29, 1995, he would have been entitled to the following vacation benefits pursuant to the applicable collective bargaining agreement, if he had worked sixty percent of the total working days of his prior anniversary year:

April 14, 1995 to April 13, 1996:	4 weeks
April 14, 1996 to April 13, 1997:	4 weeks
April 14, 1997 to April 13, 1998:	4 weeks
April 14, 1998 to April 13, 1999:	30 days
April 14, 1999 to April 13, 2000:	30 days

8. Johnson did not take any vacation time from the date of reinstatement on August 2, 1999 through April 4, 2000.

9. Roadway employees that are entitled to four or five weeks of vacation may receive compensation for the fourth and/or fifth weeks of vacation if they do not take the vacation days. Roadway employees do not receive vacation pay in lieu of vacation for the first three weeks of vacation. Employees who do not take earned vacation within the twelve month period subsequent to the end of the anniversary year in which such vacation was earned forfeit

entitlement to that vacation time off and/or pay.

10. Compensation for the fourth and fifth weeks of vacation is computed on the basis of 1/52 of the employee's earnings for the twelve month period preceding the vacation period.

11. Under the collective bargaining agreement, Johnson would have been entitled to five days of sick leave per contract year.

12. Sick leave that is not used by March 31 of any contract year will be paid at the following hourly rates, times eight hours per unused day:

April 1, 1995 to March 31, 1996	$17.73 per hour
April 1, 1996 to March 31, 1997	$18.08 per hour
April 1, 1997 to March 31, 1998	$18.48 per hour
April 1, 1998 to March 31, 1999	$18.75 per hour
April 1, 1999 to August 1, 1999	$18.75 per hour

13. Had Johnson's employment continued with Roadway after March 29, 1995, he would have been entitled to ten paid holidays per year.

14. Employees receive holiday pay as part of their weekly compensation and is paid at eight hours of straight time pay. Employees who work on a holiday receive four hours straight time pay in addition to the holiday pay.

15. Had Johnson continued employment, Roadway would have made pension contributions:

April 1, 1995 to March 31, 1996:	$20.60 per day or tour of duty, maximum $103.00 per week
April 1, 1996 to March 31, 1997:	$20.80 per day or tour of duty, maximum $114.00 per week
April 1, 1997 to March 31, 1998:	$25.60 per day or tour of duty, maximum $128.00 per week
April 1, 1998 to March 31, 1999:	$25.60 per day or tour of duty, maximum $128.00 per week
April 1, 1999 to August 1, 1999:	$28.00 per day or tour of duty, maximum $140.00 per week

(JX A).

At the hearing, the parties agreed to the following:

16. Johnson was reinstated to his employment at Roadway on August 2, 1999. (TR 19).

17. In 1995, prior to his termination from Roadway, Johnson used all five of his sick days and all of his vacation time. (TR 327, 329).

18. Johnson was originally hired at Roadway on April 4, 1978. (TR 330).

V. DISCUSSION

1. Mitigation of Damages

The Board found that Johnson's refusal to take the Burlington Truck Lines job did not terminate his entitlement to back pay, and remanded the case to this court to determine if or when Johnson's back pay entitlement was tolled.

Once the complainant establishes that he or she was terminated as a result of unlawful discrimination on the part of the employer, it becomes the employer's burden to prove by a preponderance of the evidence that the employee did not exercise reasonable diligence in finding other suitable employment. *Timmons v. Franklin Electric Cooperative*, ARB Case No. 97-141, ARB D&O, slip op. At 11 (Dec. 1, 1998). *See also Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1234 (7th Cir. 1986).

An employee is only required to make a reasonable effort to mitigate damages, and is not held to the highest standard of diligence. This burden is not onerous, and does not mandate that the plaintiff be successful in mitigating the damage. *NLRB v. Ryder System, Inc.*, 983 F2d 705 (6th Cir. 1993), *citing NLRB v. Westin Hotel*, 758 F2d 1126,1130 (6th Cir. 1985). *See also Intermodal Cartage Co. Ltd. v. Reich*, 113 F.3d 1235 (6th Cir. 1997). The employer may prove that the complainant did not mitigate damages by establishing that comparable jobs were available and that complainant failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment. *Ass't Sec'y of Labor for Occupational Safety and Health and Johnny Landsdale Donna Lee v. Intermodal Cartage Co., Ltd.*, Case No. 94-STA-22, *Sec'y Final Dec. and Ord., slip op.* at 6-7, July 26, 1995, *Intermodal Cartage Co. Ltd. v. Reich*, 113 F.3d 1235 (6th Cir. 1997). *See also U.S. v. City of Chicago*, 853 F.2d 572, 578 (7th Cir. 1988); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 624 (6th Cir., 1983)(employer may satisfy its burden only by establishing that there were substantially equivalent positions which were available and that the claimant failed to use diligence in seeking such positions).

In order to sustain its burden the employer must prove two elements: (1) that comparable jobs were available; and (2) that complainant failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment. At the hearing, the employer offered the testimony of employees from various trucking companies who testified that the trucking companies were hiring during the interim period that Johnson was not employed at Roadway. By

this testimony, the employer attempts to establish, under the first prong, that substantially equivalent jobs were available. A substantially equivalent job offers "virtually identical promotional opportunities, compensation, job responsibilities, working conditions and status." *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983).

Employees from Consolidated, U.S.F. Holland, and Yellow Freight all testified to the particulars of the available jobs. However, all agreed that regardless of prior experience, a new employee would start at the bottom of the seniority list and would have to work from one to two years to achieve a bid run. Furthermore, new employees were paid at a lesser rate, seventy-five percent of the April, 1994 rate. Johnson had worked at Roadway in excess of fifteen years when he was terminated in 1995. He testified that he was able to hold the bids that he selected based on his seniority. He also testified that he held district bids which allowed him to be home most nights.

Because Johnson would start at the bottom of the seniority list with employment at U.S.F. Holland, Consolidated, and Yellow Freight, would be paid at a lesser rate than more senior employees, and was not able to select his preferred bid, I find that these jobs do not constitute substantially equivalent employment. Furthermore, Richard Hopkins for U.S.F. Holland testified about its city driver positions. I find that the city driver positions are not substantially equivalent because city drivers are paid ten percent less than U.S.F. Holland's highway drivers and Mr. Hopkins agreed that the job duties are markedly different. (TR 123).

The employer argues that employment at U.S.F. Holland, Consolidated, and Yellow Freight would constitute substantially equivalent employment. The employer cites *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232-233 (1982), for the proposition that "the fact that Johnson would not have had the seniority to hold his preferred bid when first employed by one of these carriers does not preclude the employment from being considered substantially equivalent employment." However, in *Ford Motor Co.*, the court was addressing the situation where an employer charged with unlawful discrimination offers the claimant his/her job back. *Id*. at 232. The court stated that the charged employer need not supplement the offer by retroactive seniority. However, the claimant remains entitled to full compensation and retroactive seniority if he/she wins the case. *Id*. at 233. *Ford Motor Co.* does not address whether employment with other employers offering less seniority would constitute substantially equivalent employment. As discussed above, I find the jobs listed by the employer are not substantially equivalent because they did not offer "virtually identical" compensation and status. *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983).

Even assuming that employment at U.S.F. Holland, Consolidated, and Yellow Freight constituted substantially equivalent employment, the employer has not shown that Johnson did not make reasonable efforts in finding substantially equivalent employment. Mr. Roberts testified that as part of its normal business practice, Yellow Freight's Human Resource Department maintains a

record of individuals who apply for employment.[9] Mr. Roberts called the Human Resource Department to confirm that Mr. Johnson did not apply for employment. Even assuming that Mr. Roberts' testimony is correct that Johnson did not apply for employment at Yellow Freight, he is not held to the highest standard of diligence. The burden is not onerous, and does not mandate that the plaintiff be successful in mitigating the damage. *NLRB v. Ryder System, Inc.*, 983 F2d 705 (6th Cir. 1993), *citing NLRB v. Westin Hotel*, 758 F2d 1126,1130 (6th Cir. 1985). *See also Intermodal Cartage Co. Ltd. v. Reich*, 113 F.3d 1235 (6th Cir. 1997). Assuming that the employer established that Johnson did not apply at Yellow Freight, the employer has not established that Johnson did not make reasonable efforts in finding employment. From the stipulations of facts, between 1995 and 1998, Johnson worked at various jobs as a driver, laborer and truck driver for twelve different employers. I find that Johnson made sufficient efforts to mitigate his damages and find other employment.

2. Tolling of Back Pay

The next issue is whether when Johnson left subsequent employment, Roadway's obligation for back pay was tolled? A claimant who leaves his job for a justifiable reason does not forfeit his right to additional back pay. *NLRB v. Ryder System, Inc*., 983 F.2d 705, 714 (6th Cir. 1993); *Mastro Plastics Corp*., 136 NLRB 1342 (1962), enforced, 354 F2d 170 (2nd Cir. 1965). Because the Board found the Burlington Truck Lines job was not substantially equivalent and did not toll the back pay award, I must analyze Johnson's jobs subsequent to Burlington to determine whether Johnson was able to leave the subsequent employment without tolling his back pay award. The parties stipulated to the following reasons why Johnson ended his employment with various employers:

Arrowhead Construction	Resigned because the company was broke.
Celadon Trucking	Resigned to relocate South.
EVI Services	Resigned because of work shortage.
DOT Leasing	Resigned because of work shortage.
Aaron's Limousine	Resigned because of work shortage.
Laura Stewart	Resigned because not paid.
Landstar Poole	Discharged.
TransState Lines	Resigned because of stress and hours.
CRST	Resigned because of job dispute
DeKalb Transportation	Laid off.
Chieftain[10]	No reason given.
Saturn	Reinstatement by Roadway.

[9] Although I permitted Mr. Roberts to testify about the employment records over a hearsay objection, I find the testimony of little consequence because I ultimately find that Roadway has failed to establish that Johnson did not make sufficient efforts to mitigate his damages.

[10] Johnson testified at the hearing that he left Chieftain to go to Saturn because Saturn offered better pay and benefits. (TR 36, 42-44).

I find that Mr. Johnson had justifiable reasons for leaving his employment at Arrowhead Construction, Celadon Trucking, EVI Services, DOT Leasing, Aaron's Limousine, and Laura Stewart. I find that Mr. Johnson's reasons for leaving work because he was not being paid, the companies had a shortage of work, and he relocated, are legitimate reasons which do not toll the back pay award.

However, Mr. Johnson was terminated from his position at Landstar Poole. Discharge from interim employment will toll back pay liability only if the employee's misconduct was "gross" or "egregious."[11] *NLRB v. Ryder System, Inc.*, 983 F.2d 705 (6th Cir. 1993), *citing NLRB v. PIE Nationwide, Inc.*, 923 F.2d 506, 513 (7th Cir. 1991). It is the employer's burden to prove that back pay should be tolled. *Thurman v. Yellow Freight Systems, Inc.*, 90 F3d 1160, 1168 (1996), *citing Ryder* at 712.[12] Furthermore, in order to mitigate damages, an employee needs to diligently seek substantially equivalent employment during the interim period and must also act reasonably to maintain such employment. A failure to mitigate damages through the retention of employment will reduce the employer's back pay liability in that the back pay award will be reduced by no less an amount than that which the complainant would have made had he remained in the interim employment throughout the remainder of the back pay period. Only if the employee's misconduct is gross or egregious, or if it constitutes a wilful violation of the company rules, will termination resulting from such conduct serve to toll the discriminating party's back pay liability. *Cook v. Guardian Lubricants, Inc.*, 95 STA-43 (ARB May 30, 1997).

In Complainant's Answers To Roadway's First Set of Interrogatories, Mr. Johnson stated that from January 23, 1998 to March 7, 1998, he worked for Landstar Poole, Inc. as a truck driver. (JX 13). Complainant asserted that he was terminated by Landstar Poole, Inc. over a misunderstanding concerning his driving record. (JX 13-10).

Mr. Johnson testified at deposition on April 26, 1999. He testified that he was terminated by Landstar Poole. Mr. Johnson stated that he allowed his cousin to back up his truck in a private parking lot. He stated that the police came and found beer bottles in the truck and arrested him for DUI. Johnson stated the DUI was not proven against him. (Dep. 93). Johnson testified that the police thought his cousin was trying to run over the police car. Johnson explained that the beer bottles in the cab were from when he had the truck parked and he claimed to have drank the beer to relax and go to sleep. (Dep. 94). Johnson testified that the DUI charge was dropped. (Dep.94-95).

Mr. Johnson also discussed his termination at Landstar at the May 11, 1999 hearing. He

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[11] "Egregious" is defined as extremely or remarkably bad; flagrant. BLACK'S LAW DICTIONARY, p. 534 (7th Edition 1999).

[12] In *Thurman v. Yellow Freight*, the court found that the employee did not act intentionally when he drove a truck under an overpass that was too low. Therefore, the employer did not establish the employee committed a gross or egregious wrong.

testified that he was terminated from Landstar Pooled because he permitted his cousin to drive his truck. Mr. Johnson testified that the police showed up and his cousin jumped out from behind the steering wheel and left Johnson. Johnson was taken to jail and charged with DUI. Johnson was not convicted of a DUI. Johnson testified that he should not have allowed his cousin to drive the truck because it was against Landstar's policy. (TR 79). Mr. Johnson stated his cousin wanted to back up Landstar Poole's truck. His cousin did not have a commercial driver's license. (TR 169). Mr. Johnson stated that he later learned that it was against company policy to allow someone else to operate his truck. (TR 170). Mr. Johnson testified that there were six beer bottles in the truck and that he was on medication. (TR 170). The police became involved because they thought his cousin was trying to run them over. (TR 171). Mr. Johnson stated his cousin was backing the truck down a public street into a private parking lot. (TR 174). Landstar terminated Johnson for violating company policy for allowing his cousin to back up the truck. (TR 175). Johnson testified that Landstar did not terminate him for having beer bottles in the cab. Johnson claimed that Landstar offered him his job back. (TR 175).

Based on Johnson's deposition and hearing testimony, I find sufficient evidence that his conduct constituted "gross" or "egregious" conduct sufficient to toll Roadway's back pay liability. I find that Johnson's actions, allowing his cousin to operate his truck, knowing that his cousin did not have a commercial driver's license, was dangerous and could have resulted in injury to the public. Furthermore, he violated Landstar's policy by permitting his cousin to drive the truck. Therefore, because of the dangerous potential of Johnson's actions and his violation of company policy, I find his conduct sufficient to constitute "gross" or "egregious" and find Roadway's back pay liability was tolled upon his discharge from Landstar.[13]

3. Back Pay Calculations

Back pay calculations must be reasonable and supported by the evidence of record, but need not be rendered with "unrealistic exactitude."*Cook v. Guardian Lubricants, Inc*., 95-STA-43 (ARB May 30, 1997). Back pay awards are, at best, approximate and any "uncertainties in determining what an employee would have earned but for the discriminations should be resolved

[13] I found Johnson's conduct and termination from Landstar "gross" and "egregious" sufficient to toll his backpay liability. Assuming that Johnson's conduct was not sufficient to toll back pay liability, under *Cook v. Guardian Lubricants, Inc*., 95 STA-43 (ARB May 30, 1997), a failure to mitigate damages through the retention of employment will reduce the employer's back pay liability in that the back pay award will be reduced by no less an amount than that which the complainant would have made had he remained in the interim employment throughout the remainder of the back pay period. If I had not found Johnson's conduct "gross" or "egregious" he would be entitled to back pay until he was reinstated at Roadway less the amount he would have earned had he remained employed at Landstar. Johnson asserts that he earned $679 per week and the employer argues Johnson earned $713 per week at Landstar. I find that Johnson worked six weeks at Landstar, from January 23, 1998 through March 7, 1998 and earned $4,278. Therefore, his wages would be reduced by $713 per week had I not found Johnson's conduct "gross" or "egregious." Appendix A sets forth the calculations assuming Johnson's back pay award was not tolled upon his termination from Landstar

against the discriminating employer." *Pettway v. American Cast Iron Pipe Co., Inc*., 494 F.2d 211, 260-61 (5th Cir. 1974). Although the parties stipulated to the wages of the driver immediately above and below Johnson on the seniority list, the parties did not agree that the stipulated numbers should be used in calculating the back pay awards. I use the stipulated wages of similar employees to calculate Johnson's back pay award because the wages of comparable employees most fairly reflects Johnson's earning potential, is the least speculative alternative method for calculating back pay, and accounts for any pay increases Johnson would have been entitled had he remained employed at Roadway.

The employer argues that due to Johnson's past attendance record, he would not have earned as much as the representative employees' wages listed in the stipulations of facts. Employer argues that any back pay award should reflect his past record and he should be awarded 77% and 82% of representative employees' wages. Although the employer argues that Johnson should not receive a windfall award, I will not speculate about Johnson's conduct and determine whether he would have earned less than other representative employees. I resolve the uncertainties against the discriminating employer and use the wages of comparable employees in determining Johnson's back pay award.

The employer further argues that, in his past employment, Johnson would always take all of his vacation and sick days. As stated above, I resolve any uncertainties in determining what an employee would have earned against the discriminating employer. *Pettway v. American Cast Iron Pipe Co., Inc*., 494 F.2d 211, 260-61 (5th Cir. 1974). Because Johnson was terminated for an unlawful reason, and he did not have to opportunity to use his vacation and sick days, I am awarding the vacation days in excess of three weeks and sick days as part of the back pay award. I did not award holiday pay because the parties stipulated that employees receive holiday pay as part of their weekly compensation. Furthermore, Mr. Forrest from Roadway testified that only a small number of employees work holiday and receive an extra four hours of straight time pay. (TR 166-167).

Johnson was terminated from Roadway on March 29, 1995 and reinstated at Roadway on August 2, 1999. Johnson was terminated from Landstar on March 7, 1998. As discussed above, I find that Roadway is liable for back pay award from the date of discharge from Roadway on March 29, 1995 until he was discharged from Landstar on March 7, 1998.

In the following calculations, I used the numbers provided by the parties in the stipulations of facts:

Year	Rate of Pay per month times (x) the total months liable	Pension Contribution*	Vacation in excess of 3 wks**	Sick Leave, Five days per contract year	Total
1995 Johnson was terminated from Roadway on 3-29-95. Therefore, Roadway is liable for 9 months of back pay in 1995.	$5,155 x 9 = **$46,395**	38.97 wks for $103/wk = **$4,013.91**	Used all of his vacation. (TR 327, 329).	Used all of his sick days. (TR 327, 329)	$50,408.91
1996	$5,430 x 12 = **$65,160**	$103/wk for 12.99 wks= **$1,337.97** $114/wk for 38.97 wks= **$4,442.58**	1 wk = **$1,253**	$18.08/hr x 40 hrs = **$723.20**	$72,916.75
1997	$5,261 x 12 = **$63,132**	$114/wk for 12.99wks = **$1,480.86** $128/wk for 38.97 wks= **4,988.16**	1 wk = **$1,214**	$18.48/hr x 40 hrs = **$739.20**	$71,554.22
1998 Johnson was terminated from Landstar on 3-7-98. Therefore, Roadway is liable for 2 months of back pay in 1998.	$5,382 x 2 = **$10,764**	$128/wk for 8.66 wks= **$1,108.48**	2 wks = **$2,484**	$18.75/hr x 40 hrs = **$750.00**	$15,106.48

* I assume that there are 4.33 weeks in a month. The parties stipulated to the pension contributions per week. The pension year runs from April 1 of the first year to March 31 of the next year at the listed rate.

** The parties stipulated that employees entitled to more than three weeks vacation may receive compensation for the fourth and fifth weeks if they do not take the vacation days. Employees do not receive vacation pay in lieu of vacation for the first three weeks of vacation. Vacation is determined by working 60% or more of the total working days of the prior anniversary year. Vacation time is calculated based on 1/52 of the employee's earnings for the twelve month period preceding the vacation period.

From the table above, Johnson's interim wages[14] and the back pay Roadway previously paid are subtracted:

Total From Table		$209,986.36
Arrowhead	-	$11,640
Celadon	-	$ 6,567
EVI Services	-	$ 330
DOT Leasing	-	$ 561
Aaron's Limo	-	$ 5,100
Laura Stewart	-	$ 1,300
Landstar Poole	-	$ 4, 278
Roadway Back Pay[15]	-	$11,930.40
Total Award		**$168,279.96**

From the back pay award, $17,371.96 is to be paid to the Teamsters Local 710 Pension Fund for the account of Danny K. Johnson.[16]

Prejudgment interest is to be paid for the period following Johnson's termination on March 29, 1995 until my order of reinstatement, July 21, 1999.[17] Post-judgment interest is to be paid thereafter, until the date payment of the back pay is made. *Johnson v. Roadway Express, Inc*., ARB No. 99-111 (ARB Mar. 29, 2000). The rate of interest to be applied is that required by 29 C.F.R. §20.58(a)(1999) which is the IRS rate for the underpayment of taxes set out in 26 U.S.C. §6621(1999). The interest is to be compounded quarterly. *Ass't Sec'y & Harry D. Cotes v. Double R. Trucking, Inc.*, ARB No. 99-061, ALJ No. 1998-STA-34, (ARB Jan. 12, 2000).

VI. CONCLUSION

I find that Roadway has not established that substantially equivalent employment was available. Even assuming that comparable jobs were available, Roadway has not shown that Johnson did not make reasonable efforts in finding substantially equivalent employment. Johnson's discharge from Landstar was the result of "gross" or "egregious" conduct sufficient to toll Roadway's back pay obligation.

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[14] The interim wages are the wages Johnson earned between the time he was terminated from Roadway on March 29, 1995 and when he terminated from Landstar on March 7, 1998.

[15] Claimant agreed that $11,930.40 should be deducted from any damage award. (TR 331).

[16] In Complainant's Brief After Hearing On Remand, complainant agrees that any amount in pension contributions should be paid to the Teamsters Local 710 pension fund for the account of Danny K. Johnson.

[17] Prejudgment interest on a back pay award under the STAA should be calculated in accordance with 26 U.S.C. § 6621. *Park v. McLean Transportation Services, Inc*., 91-STA-47 (Sec'y June 15, 1992).

RECOMMENDED ORDER

1. Counsel for the complainant shall submit a detailed attorney fee petition not later than 30 days from the date of this Order. The Respondent has fourteen days in which to submit any objections to such petition.

2. Respondent is ordered to pay Johnson back wages for the period of March 29, 1995 through the date he was discharged from Landstar on March 7, 1998, in the amount of $150,908.00.

3. The amount of $17,371.96 is to be paid to the Teamsters Local 710 Pension Fund for the account of Danny K. Johnson.

3. Respondent is ordered to pay Johnson interest on the back pay award calculated in accordance with 26 U.S.C. § 6621(1998).

4. Respondent is ordered to compensate Johnson for the costs and expenses he reasonably incurred in bringing this complaint.

RICHARD A. MORGAN
Administrative Law Judge

RAM:EAS:dmr

APPENDIX A

CALCULATIONS ASSUMING JOHNSON'S BACK PAY AWARD WAS NOT TOLLED UPON HIS TERMINATION FROM LANDSTAR

Year	Rate of Pay per month times (x) the total months liable	Pension Contribution*	Vacation in excess of 3 wks**	Sick Leave, Five days per contract year	Total
1995 Johnson was terminated from Roadway on 3-29-95. Therefore, Roadway is liable for 9 months of back pay in 1995.	$5,155 x 9 = **$46,395**	38.97 wks for $103/wk = **$4,013.91**	Used all of his vacation. (TR 327, 329).	Used all of his sick days. (TR 327, 329)	$50,408.91
1996	$5,430 x 12 = **$65,160**	$103/wk for 12.99 wks= **$1,337.97** $114/wk for 38.97 wks= **$4,442.58**	1 wk = **$1,253**	$18.08/hr x 40 hrs = **$723.20**	$72,916.75
1997	$5,261 x 12 = **$63,132**	$114/wk for 12.99wks = **$1,480.86** $128/wk for 38.97 wks= **$4,988.16**	1 wk = **$1,214**	$18.48/hr x 40 hrs = **$739.20**	$71,554.22
1998	$5,382 x 12 = **$64,584**	$128/wk for 52 wks= **$6,656.00**	2 wks = **$2,484**	$18.75/hr x 40 hrs = **$750.00**	$74,474
1999 Johnson was reinstated at Roadway on August 2, 1999.	$5,681 x 7 = **$39,767**	$128/wk for 12.99 wks= **$1,662.72** $140/wk for 17.32 wks= **$2,424.80**	2 wks = **$2,622**	$18.75/hr x 40 hrs = **$750.00**	$47,226.52

* I assume that there are 4.33 weeks in a month. The parties stipulated to the pension contributions per week. The pension year runs from April 1 of the first year to March 31 of the next year at the listed rate.

** The parties stipulated that employees entitled to more than three weeks vacation may receive compensation for the fourth and fifth weeks if they do not take the vacation days. Employees do not receive vacation pay in lieu of vacation for the first three weeks of vacation. Vacation is determined by working 60% or more of the total working days of the prior anniversary year. Vacation time is calculated based on 1/52 of the employee's earnings for the twelve month period preceding the vacation period.

APPENDIX A

INTERIM WAGES JOHNSON ACTUALLY EARNED:

Arrowhead	-	$11,640
Celadon	-	$ 6,567
EVI Services	-	$ 330
DOT Leasing	-	$ 561
Aaron's Limo	-	$ 5,100
Laura Stewart	-	$ 1,300
Landstar Poole	-	$ 4, 278
TransState	-	$ 1,940
CRST	-	$ 2,632
DeKalb	-	$ 3,715
Chieftain	-	$ 4,398
Saturn	-	$ 4,521
		$ 46,982

APPROXIMATED INTERIM WAGES JOHNSON WOULD HAVE EARNED AT LANDSTAR FROM MARCH 7, 1998 THROUGH AUGUST 2, 1999:

73 wks x $713 per week[18] = $ 52,049

FINAL CALCULATION

Johnson actually earned $46,982 in interim wages. Had he remained employed with Landstar, Roadway's liability would have been reduced by $52, 049. Therefore, assuming that Johnson's conduct was not sufficient to toll Roadway's back pay liability, Johnson's back pay award would be reduced by the amount he would have earned at Landstar.

Total From Table		$316,580.40
Landstar's Wages	-	$ 52,049.00
Roadway Back Pay[19]	-	$ 11,930.40
Total Award		$252,601.00

Therefore, if Johnson's conduct was found not to be "gross" or "egregious" he would be awarded in $225,594 back pay and $27,007 would be paid to the Teamsters Local 710 Pension Fund for the account of Danny K. Johnson. In addition, Johnson and the Pension Fund would be entitled to interest.

[18] Johnson was terminated from Landstar on March 7, 1998 and rehired at Roadway on August 2, 1999. Therefore, one year and five months passed, (73 weeks), between the time Johnson was terminated from Landstar and rehired at Roadway.

[19] Claimant agreed that $11,930.40 should be deducted from any damage award. (TR 331).